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FILED

MAR 13 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

PAUL CIAFFONI, CONCETTA CIAFFONI, AND
PETER CIAFFONI, Petitioners
AGAINST

BRUNSWICK CORPORATION
AND
BRUNSWICK AUTOMATIC PINSETTER
CORPORATION, Respondent

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF PENNSYLVANIA

PETTTION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

MILTON D. ROSENBERG
Counsel for Petitioner
200 Washington Trust Building
Washington, Pennsylvania

SMITH BROS., LAW PRINTERS, 620 SECOND AVENUE, PITTSBURGH, PA. 15219

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Petitioner prays that a writ of certiorari issue to review the judgments of the Supreme Court of Pennsylvania entered in the above case on December 13, 1968.

OPINIONS BELOW

The opinions of the Supreme Court of Pennsylvania are not yet officially or unofficially reported.

JURISDICTION

The judgments of the Supreme Court of Pennsylvania were filed on November 12, 1968. A petition for reargument was denied on December 13, 1968. Copies thereof are appended to this petition. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

QUESTIONS PRESENTED

A referee in bankruptcy, in response to a reclamation petition, ordered possession of the property in question returned to respondents. While respondents were in the process of removing the property from petitioners leased premises petitioners distrained against the property. The Supreme Court of Pennsylvania apparently viewed this as a collateral attack on an in rem adjudication of the referee while the property was in custodia legis. The questions presented are:

1. Whether property has passed from *custodia legis* when a referee in bankruptcy has entered his order granting possession of the property.

2. Whether possession of property granted by a referee in bankruptcy, in response to a reclamation petition, is an in rem adjudication binding on all who might claim an interest in the property.

STATUTES INVOLVED

The general principles of the Bankruptcy Act of July 1, 1898 as amended are involved but Petitioners rely on no particular provision of that Act nor do they believe there to be a provision of the Act to be determinative of the questions here.

STATEMENT

One Isadore Toder, under an agreement dated July 30, 1960, leased certain property from petitioners, Paul Ciaffoni and Peter Ciaffoni, who owned the property as tenants in common. Under a Rider Agreement which formed part of the lease, the lease was assigned to McDonald Bowl, Inc. (McDonald), a corporation formed by Toder to start a bowling alley. The lease was for a term of ten years, for a total rent of $119,520. It provided, in case of default, bankruptcy, or insolvency, for the entire balance of the rent to become due and payable. Provision was made permitting the lessor to distrain for rent on all property found on the premises.

McDonald proceeded to purchase under conditional sales contracts a great deal of bowling equipment from Brunswick Corporation and Brunswick Automatic Pinsetter Corporation. These corporations filed proper financing statements and became secured creditors. McDonald then defaulted in its obligations to both Brunswick corporations and to the landlords.

On May 3, 1962, in the U. S. District Court for the Western District of Pennsylvania, McDonald was adjudicated a bankrupt. On July 5, 1962, the Referee in Bankruptcy entered an order that appellees were "entitled to take possession of the personal property" that is here in dispute. When appellees sought, on July 20, 1962, to remove the equipment, Paul Ciaffoni personally distrained on all the items and instructed employees of Brunswick to leave the premises and they departed voluntarily. Peter Ciaffoni then, on July 23, 1962, distrained for rent on the equipment, taking possession of it.

Statement.

On July 30, 1962, respondents filed an action in replevin with bond of $300,000. Petitioners not having filed a counter bond, the respondents repossessed the property on September 15, 1962.

After a non-jury trial in The Court of Common Pleas of Washington County, the Honorable Barron P. McCune made an order awarding to Peter Ciaffoni his one-half share of the rents in default. On respondents' exceptions, the court *en banc* vacated the prior order and in an opinion by Judge McCune, ordered judgment for respondents on a third party creditor beneficiary theory.

The Supreme Court of Pennsylvania with concurring and dissenting opinions found that the personalty involved was in *custodia legis* when distrained against. It held that the adjudication of the referee in bankruptcy in response to a reclamation petition was "*in rem* binding on all who might claim an interest in the property."

REASONS FOR GRANTING THE WRIT

The decision of The Supreme Court of Pennsylvania should be reviewed because it erroneously interprets the jurisdiction power and duty of the referee in bankruptcy. Under this decision *custodia legis* of the referee extends for an indefinite period beyond the order making disposition of the property. Neither this Court nor any other Federal Court appears to have considered this problem. And perhaps it would be of little moment if it were not, as here, linked with the presumed in rem nature of the reclamation petition. Here the trustee and referee determined that the general creditors had no interest in the Respondents' property and returned it to them. The Supreme Court of Pennsylvania finds this adjudication to be *"in rem."* What of the judgment creditor who attempts to execute against the property or more importantly the secured creditor of the Respondents'? If neither of these parties appeared before the referee (and it seems clear that neither would have the right to appear) his claim would still be cut off by the order of the referee. With the substantial and increasing use of the state filed security agreement this decision becomes one of great importance. As is the case with Petitioners, those without liens but with an enforceable right to property, possession to which is granted by a referee in bankruptcy to a secured creditor of the bankrupt, will lose that right if the decision of the Supreme Court of Pennsylvania is not overcome or circumscribed. Further, if property such as that in this case remains in *custodia legis* until it is sold or removed from the jurisdiction or the like those with legitimate claims on the property will likely lose the claims because of a referee's order which never

took into considerations the claims involved. Such an abuse of the concept of *custodia legis* should not go without review.

The questions presented in this case are of great significance in the application of the Bankruptcy Act, most especially in the area of secured and judgment creditors. They have never been considered by this Court. The serious question of permitting state courts to decide matters of Federal bankruptcy jurisdiction and power makes this case a peculiarly appropriate one for the exercise of this Court's discretionary jurisdiction.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

MILTON D. ROSENBERG
Counsel for Petitioner

REME COURT. U. S

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IN THE

Supreme Court of the United States

NO. 1153 OCTOBER TERM, 1968

PAUL CIAFFONI, CONCETTA CIAFFONI, AND PETER CIAFFONI, Petitioners

AGAINST

BRUNSWICK CORPORATION

AND

BRUNSWICK AUTOMATIC PINSETTER CORPORATION, Respondent

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA (WESTERN DISTRICT)

MILTON D. ROSENBERG
Counsel for Petitioner
200 Washington Trust Building
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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA (WESTERN DISTRICT)

IN THE COURT OF COMMON PLEAS
OF WASHINGTON COUNTY, PENNSYLVANIA

BRUNSWICK CORPORATION and BRUNSWICK AUTOMATIC PINSETTER CORPORATION, Plaintiffs

v.

PAUL CIAFFONI, CONCETTA CIAFFONI and PETER CIAFFONI, Defendants

No. 480 May Term, 1962, A.D.

APPEARANCES:

HAROLD V. FERGUS, ESQ., and LAWRENCE R. ZEWE, ESQ., of Washington, Pennsylvania, Counsel for Plaintiffs.

BLOOM, BLOOM, ROSENBERG & BLOOM, of Washington, Pennsylvania, Counsel for Defendants.

Opinion and Order

McCUNE, J., November 2, 1966.

We are called upon to decide several issues raised by an Amended Complaint in Replevin to which an Answer and an Amended Answer was filed raising new matter. The new matter was duly answer and there followed a hearing at which testimony was taken and several stipulations were made a part of the record.

Based upon the foregoing we conclude that Paul Ciaffoni and Peter Ciaffoni owned real estate in the

Borough of McDonald, this County, as tenants in common each owning an undivided one-half thereof. On July 30, 1960, the owners leased the premises to Isadore Toder who assigned the lease to McDonald Bowl, Inc., a corproation formed by Toder to start a bowling alley. The lease was for a term of ten years for a total rent of $119,520.00, payable according to a rider agreement. The lease provided that the lesor could distrain for rent on all property found on the premises or hold all property as security for rent. The rider agreement provided that $11,520.00 be deposited when the lease was signed. The term of the lease commenced when possession was delivered after certain remodeling and at this time the deposit was to be paid to lessors who would thereafter collect rental at the rate of $1,000.00 per month.

The lease also stated that in event of default the tenant empowered any attorney of any Court of record to appear for tenant and with or without declaration filed, confess judgment for the sum due with costs of suit and an attorney's commission of $500.00 and that execution might issue forthwith. Further, in the event of default or bankruptcy or insolvency the entire balance of the rent should immediately become due and payable. The rider agreement provided that notice should be a condition precedent to the entry of judgment. It also provided that both Peter and Paul Giaffoni would waive the right of distraint so that Brunswick would install the required equipment.

On October 3, 1960, the tenant, pursuant to the establishment of its bowling alley, contracted with Brunswick Corporation, et al., the plaintiffs, to install

extensive bowling lanes and equipment within the leased premises agreeing to pay for it over a period of time and secured its promise with conditional sales contracts and financing statements which were recorded in this county and in Harrisburg. (Dates of filing with the Commonwealth were October 5 and October 11, 1960. Apparently there was one statement in favor of Brunswick and one in favor of Brunswick Automatic Pinsetter Corporation.) The conditional sales agreements gave plaintiffs the right to reclaim the equipment in the event of defaul in the payments due.

Brunswick had planned to secure a waiver of the landlord's privilege to distrain for rent because on September 16, 1960 it had secured from Paul Ciaffoni such waiver. Unfortunately Peter Ciaffoni did not join in it and no separate release was ever acquired from Peter. Although Peter agreed with Toder that he would furnish such a release he evidently was not asked for one.

On October 13, 1961, the tenant defaulted in the payments due for the bowling equipment and apparently it was unable to pay the rent as well because on January 29, 1962 judgment by confession was taken and execution was issued forthwith. The Sheriff of this county levied on the goods on January 30, 1962. The judgment was for $107,000.00 (the balance of the rent due), interest of $642.00 and an attorney's commission of $500.00 or a total of $108,142.00.

On February 17, 1962, this Court enjoined the execution and appointed a temporary receiver for tenant and on May 3, 1962 the U. S. Dist. Court adjudicated

tenant a bankrupt. On or about July 5, 1962, the Referee in Bankruptcy awarded possession of the bowling equipment to plaintiffs who were in possession of keys to the premises but who handed over the keys to owner Paul Ciaffoni and vacated the premises when requested to do so two or three days prior to July 23, 1962. The plaintiffs, it appears, had sent men to the premises to remove the equipment about July 20, 1962 but they were met by Paul Ciaffoni when he went personally to the premises in an effort to distrain. When asked to leave, the man in charge turned over the keys and vacated.

Peter Ciaffoni caused a distraint to be made on the property in question on July 23, 1962 by constable Edward J. Manes.

On July 30, 1962, plaintiffs filed a Writ of Replevin with bond in the amount of $300,000.00 following which the property was removed.

The question before us now is whether or not Peter or Paul Ciaffoni are entitled to any of the rent. (More accurately, whether they are entitled to the value of the goods distrained upon. However, since the value of the goods is $150,000.00 and the rent claimed is only $108,142.00, it is the rental which is in issue.) If either of them are, the bond is available to secure it. Several questions are posed by the parties, e.g., the plaintiffs argue that when the adjudication in bankruptcy was made the landlords were relegated to the status of general creditors in spite of their levy and had no lien because a distraint had not yet been made. They argue that the conditional sales agreement gave plaintiffs a lien which the Referee properly recognized by awarding

the property to the plaintiffs and since no distraint was made before bankruptcy the award by the Referee was final and conclusive.

The plaintiffs further argue that Paul Ciaffoni waived distraint for both tenants in common so Peter is bound by the release which Paul signed. They contend that in any event only one year's rent can be secured by distraint, citing the Act of June 16, 1836, P.L. 755.

The defendants argue that the distraint made by Peter while the goods were on the premises even though made after an adjudication in bankruptcy (and after release of the goods by the Referee) was valid and binding and that Peter Ciaffoni is entitled to his undivided one-half the rental due for the entire term.

We can quickly conclude that Paul Ciaffoni executed a valid release of his privilege to distrain and any attempt on his part to distrain was a nullity.

We further conclude that Paul Ciaffoni's execution of the waiver did not bind Peter Ciaffoni because no agency was averred or proven. Not even consent or ratification was averred or proven. Plaintiffs citation (Peterson v. McNeeley, 125 Pa. Super 55 (1937)) is not authority for the proposition that one co-tenant binds another co-tenant when he executes a waiver of his right to distrain. No cases have been cited to prove the proposition. On the contrary, P.L.E. Vol. 1, page 475, discussing agency states that the relationship of co-owners, one to another, as, for example, tenants in common, does not necessarily entail agency, citing Appeal of Coursin, 79 Pa. 220 (1875). The same work is

authority for the statement that no general agency is to be inferred from a family relationship without more, though evidence of a family relationship may be admissible as evidence upon the point. The case of Nelson v. Ober, 31 D. & C. 50, (1937) would indicate that one tenant in common has no authority to bind the other absent authority to do so. Bernstein v. Colletris, 99 Pa. Super. 484 (1930) holds that a waiver of the right to distrain signed by one joint owner does not bind other joint owners unless they authorized the action. The record lacks any indication that Paul acted for Peter in waiving the right to distrain and we conclude that Peter did not waive the right to distrain for rent.

Peter did not distrain until after the release of the property by the Referee. The plaintiffs had started to remove the property, had been asked to leave by Paul Ciaffoni, had turned over the keys and had left the premises after which Peter Ciaffoni distrained.

It is fundamental that distraint will not lie while property is in custodia legis, Pierce v. Scott, 4 Watts and Sergeant, 344 (1842). Property in the hands of a Referee is in the custody of the law but when the Referee releases it and orders it delivered to plaintiffs it passes out of the custody of the law and becomes subject to distraint if the distraint is made before the property is moved, see National Cash Register Company v. Miller, 88 Pa. Super. 550 (1926) which is similar to the case before us. See also National Cash Register v. Cranston, 94 Pa. Super., 516 (1928).

Following the holding in National Cash Register v. Miller, it is our judgment that the distraint of Peter Ciaffoni was valid if the property had not been taken

by plaintiffs under the order of the Referee. It is not clear whether the plaintiffs had started to move the property or whether they had taken possession or whether they had abandoned possession when asked to leave. This question was not raised, briefed or argued.

How much of the rent did the distraint secure? The Act of June 16, 1836, P.L. 755 cited by plaintiffs was specifically repealed by the Landlord and Tenant Act of 1951, (68 P.S. 250.601) and the act states it shall furnish a complete and exclusive remedy in Landlord-Tenant relationships. Section 302 of the Act (68 P.S. 205.302) provides that personal property shall be subject to distress for any rent *reserved and due.* As a term of the lease the tenant waived the benefit of the Act of 1951 but, of course, the landlords did not.

We find no cases respecting the amount of rent which can be collected by distraint since the effective date of the Act of 1951 but under the Act of March 21, 1772, 1 Smith L. 370, it was decided in American Seating Co. v. Murdock, 111 Pa. Super. 242 (1933) that where the lease gave the landlord the option of declaring all rental due in event of default a distraint could be made for the rent due for the entire term. Such an acceleration clause has been held valid in this state since Goodwin v. Sharkey, 80 Pa. 149, (1875).

We conclude therefore, that the distraint of Peter Ciaffoni was valid for an undivided one-half the rental due for the entire term of $53,500 if the distraint was valid when made. The distraint was not valid for the attorney's commission or interest then claimed because the Act of 1951 permits distraint for only the rent reserved and due (Underlining supplied).

The only other question remaining is whether Paul Ciaffoni secured to himself any right by virtue of the execution by the Sheriff on January 30, 1962. This need not detain us. The Bankruptcy Act of July 1, 1898, (11 U.S.C. A. 107) provides that all levies or liens obtained through legal proceedings against a person who is insolvent at any time within four months prior to the filing of a bankruptcy petition against him, shall be void in case he is adjudged a bankrupt. We conclude that no rights were secured by the execution and Paul Ciaffoni can benefit only by the amount awarded by the Referee in the bankruptcy proceeding.

Paul Ciaffoni and Peter Ciaffoni have received some payment from the Referee, the amount of which has not been conclusively set forth. Peter Ciaffoni's award if made will be reduced by the amount of rent he has received from the Referee.

There is one fundamental question which controls the case and which, we repeat, has not been raised. It is this. Is the holding in National Cash Register Co. v. Miller affected by the fact that plaintiffs arrived at the premises before defendants? Is it affected by the fact that plaintiffs apparently started to remove the property and were told or asked to leave after which Peter Ciaffoni made his distraint? Did plaintiffs abandon possession in the event they had possession? The Court requires research on this question before a final decision can be made. Ten days is extended for the submission of briefs. If an additional record is required, application may be made to the Court.

BY THE COURT:

/s/ BARRON P. MCCUNE

Supplemental Opinion

McCUNE, J., November 23, 1966.

In our opinion of November 2, 1966, we requested briefs on the question whether or not the holding in National Cash Register Co. v. Miller, 88 Pa. Super 550 (1926) was affected by the fact that plaintiffs arrived at the rented premises before defendants and started to remove the property before any of defendants arrived.

In Pickering v. Breen, 31 Pa. Super 280 (1906) goods of a creditor were being removed from landlord's premises when the landlord arrived to make his distraint for rental in default. It was held that the creditor could keep his goods only if he had succeeded in completely removing them from the premises and beyond the curb before the distraint was made.

In Furbush et al. v. Chappell, 105 Pa. 187 (1884) a creditor who had sold machinery to tenant was in the act of removing the machinery when the landlord appeared and ordered the workmen to vacate after which he distrained for rent. The distraint was held to be good.

The lease in the case at bar conveyed all goods on the premises to the landlord as sceurity for the rent. The remedy of distraint is firmly established in the law and in our judgment the case of National Cash Register Co. v. Miller, supra, is controlling.

Accordingly, the distraint by Peter Ciaffoni for one-half the rent is held to be valid distraint. The said rental thus secured shall be reduced by one-half of the actual rental paid by the Referee in bankruptcy (the

other one-half will be considered property of Paul Ciaffoni).

Order

AND NOW, this 23rd day of November, 1966, Peter Ciaffoni is hereby awarded $53,500.00, reduced by one-half of the rental paid to landlords by the Referee in bankruptcy, with interest at the legal rate from July 23, 1962 (date of distraint). This Order shall become final unless exceptions are filed within twenty (20) days from the date hereof.

BY THE COURT

/S/ BARRON P. MCCUNE, J.

Opinion and Order

McCUNE, J., August 15, 1967.

This matter reaches us on exceptions to an Opinion and Order after a non jury trial of the issues in an action of Replevin. The many issues raised and the treatment accorded them may be referred to in the Opinions of this Court dated November 2, 1966 and November 23, 1966.

There is one issue which has been raised by exception No. 13 and which has been briefed and argued before the Court en banc which convinces us that our previous action should be reversed.

On July 30, 1960, Paul Ciaffoni and Peter Ciaffoni entered into a lease argeement with Isadore Toder agreeing to lease to him for ten years certain premises in McDonald Borough for a bowling alley. A rider attached to the lease provided that the tenant, Toder, would form a corporation to which the lease would be assigned at which time Toder's liability would cease and the corporation would become liable.

The rider further said that in order to permit tenant to finance the installation of bowling alleys and equipment lessor (Paul and Peter Ciaffoni) would execute and deliver a landlords' waiver in the general form annexed to the rider and marked "Exhibit A" as to the bowling alleys and equipment in which the supplier would have a security interest as an unpaid seller.

Toder did form McDonald Bowl Inc. and did assign his lease to the corporation which bought a great deal of equipment from Brunswick Corporation and Bruns-

wick Pinsetter Corporation. These corporations filed proper financing statements and became secured creditors.

McDonald Bowl Inc. then defaulted in its obligations to Brunswick and to the landlords. Meanwhile Paul Ciaffoni signed a landlord's waiver (as the rider agreement intended) but Peter Ciaffoni, a tenant in common and one of the lessors, did not sign a waiver nor was he asked to.

McDonald Bowl Inc. eventually was placed in bankruptcy. The equipment was awarded to Brunswick by the Referee in Bankruptcy but when it sought to remove the equipment Paul Ciaffoni instructed employees of Brunswick to leave the premises and they departed voluntarily.

A distraint for rent by Paul and Peter Ciaffoni made July 23, 1962 was held to be valid by this Court in the previous Opinions already mentioned. We had held that the equipment was no longer in the custody of the Referee when the distraint was made and we had given effect to the distraint of Peter Ciaffoni, who had never signed the landlord's waiver, although we had denied Ciaffoni recovery because he had signed the waiver.

By giving effect to Peter Ciaffoni's distraint, we had awarded him half of the total rental due the landlords. A Replevin bond had been posted by Brunswick which had replevied the equipment after its employees had failed to remove it from the premises.

We are now faced with the argument that when Peter Ciaffoni agreed with Toder to sign a landlord

waiver in favor of Brunswick so that Brunswick could safely install bowling equipment within the leased premises, Brunswick became a third party beneficiary of this contract. Therefore whether Peter Ciaffoni actually signed the waiver or not he was bound by the agreement the same as though he had signed the waiver.

(As will be observed from an examination of the record Brunswick made a grevious error because it required Paul and Concetta Ciaffoni to sign the actual waiver and neglected to have Peter sign it. Concetta had no interest in the real estate but was the wife of Paul Ciaffoni.)

Although Brunswick was not a party to the contract between lessor and tenant, the expressed intent of the contract was that Brunswick should receive a release executed by the landlords (lessors) which would waive the privilege of distraint. Brunswick was therefore a beneficiary of the contract, in this case a creditor beneficiary.

The common law gave birth to a principle which gave a crediitor beneficiary the right to enforce directly the promise from which he derives his interest, Isbrandtsen Co. v. Local 1291, 204 F. 2d 495 (3rd Cir. 1953).

If, in regard to a promise made under a contract, the promisee's expressed intent is that a third party shall receive performance in the satisfaction and discharge of some actual duty or liability of the promisee, the third party is a creditor beneficiary, Penna. Law Encyclopedia, Vol. 8, Sec. 164.

Of course, to be a third party beneficiary entitled to recover on a contract, it is not enough that it be in-

tended by one of the contracting parties and by the third person that the third person should be the beneficiary; both of the contracting parties must so intend and must indicate such an intention in the contract.

Unquestionably, lessors Paul and Peter Ciaffoni and tenant Toder intended that the landlords waive their right to distrain for rent in favor of Brunswick because in no other way could bowling equipment be purchased on credit from Brunswick. In no other way could the premises be used as a bowling alley. The benefit to the landlords was clear. They would obtain a tenant for ten years. The benefit to Toder was, of course, clear.

The Restatement of Contracts, Sections 133-147 covers this subject. Section 133 states, "where performance of a promise in a contract will benefit a person other than the promisee, that person is . . . a creditor beneficiary if no purpose to make a gift appear from the terms of the promise in view of the accompanying circumsatnces and performance of the promise will satisfy an actual or supposed or asserted duty of the promisee to the beneficiary."

In this case, Peter Ciaffoni who seeks to recover the rent due is the promisee in the contract between Toder (promisor) and Paul and Peter Ciaffoni. The performance of the promise will satisfy an actual duty of promisee to the beneficiary.

Section 138 of the Restatement states, "if specific enforcement of a duty owed to a . . . creditor beneficiary is possible and in accordance with the rules of equity, a suit for such enforcement can be maintained." No suit for specific performance is necessary here because the

contract to sign a waiver will be interpreted as the waiver itself.

Section 141 states "a creditor beneficiary who has an enforceable claim against the promisee can get judgment against either the promisee or the promisor or against each of them on their respective duties to him. Satisfaction in whole or in part of either of these duties or of judgment thereon, satisfies to that extent the other duty of judgment."

For a further discussion of third party beneficiaries, see 2 Williston on Contracts, Section 357 (Edition of 1936) and Fidelity-Philadelphia Trust Co. v. Bankers Life Insurance Co., 370 Pa. 513 (1952).

It is true that the rider agreement provided that Peter Ciaffoni would sign a release in the form attached. It is true that he never signed such form and it is true that he was never asked to do so. Defendants therefore argue that Brunswick never carried out its end of the deal. It did not present the waiver and its neglect should estop it from seeking relief now.

The rider stated in paragraph No. 11, "In order to permit tenant to finance the purchasing and installation of bowling alleys and equipment, lessor shall execute and deliver a landlord's waiver in the general form as annexed hereto and marked "Exhibit A" as to the bowling alleys and associated equipment in which the supplier therof shall have a security interest as an unpaid seller.

Attached to the rider there was a form called "Real Estate Consent" which effectively waived the landlord's interest and which was signed by Paul and Concetta

Ciaffoni alone. A blank sheet of paper accompanies it marked "Exhibit A."

It is obvious that this is the form the parites had in mind. It is obvious that Brunswick thought it had obtained "Lessors" waiver whether by one or more signatures.

(Brunswick argues, of course, that Paul Ciaffoni's signature alone was the signature of lessors but it is not necessary to go into this argument.)

It is obvious that Peter did not sign the waiver but if it was presented to him today, would he not be obligated to sign it? He contracted to sign it and should the law not consider as done that which one has agreed to do?

The maxim that equity considers done that which ought to be done or that which has been agreed will be done later has been held to be applicable in the Orphan's Court where equitable principles prevail and even in the distribution of the proceeds of a sheriff's sale. See Pa. Law Encyclopedia, Vol. 13, p. 469, citing Wolfe v. Lewisburg Trust and Safety Deposit Co., 305 Pa. 583 (1932) and Appeal of Seldon, 74 Pa. 323 (1873).

In equity Brunswick could no doubt require specific performance and obtain Peter's signature, but specific performance is not necessary since we find this statement in Synes Appeal, 401 Pa. 387 (1960) at page 391, "Equity regards that as done which has been agreed to be done and which the parties to the agreement have in their power to do."

Therefore, since Brunswick is entitled to the benefit of the waiver which Peter Ciaffoni promised to deliver,

we will hold the waiver to exist by the wording of the rider agreement.

No comment is necessary respecting the other exceptions taken by plaintiffs.

Order

AND NOW, August 15th, 1967, the Order of November 23, 1966, is vacated.

It is ordered that plaintiffs are entitled to possession of the personalty described in the action of Replevin.

The Replevin bond may be withdrawn and cancelled.

Costs of the proceeding shall be paid by defendants.

BY THE COURT

/s/ BARRON P. MCCUNE, J.

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

BRUNSWICK CORPORATION and BRUNSWICK PINSETTER CORPORATION, Appellees
v.
PAUL CIAFFONI, CONCETTA CIAFFONI and PETER CIAFFONI, Appellants

No. 23 March Term, 1968

Appeal From the Order of the Court of Common Pleas of Washington County at No. 480 May Term, 1962

Opinion of the Court

Filed November 12, 1968

O'BRIEN, J.

This is an appeal from the order of the Court of Common Pleas of Washington County, awarding personal property to the plaintiff-appellees.

One Isadore Toder, under an agreement dated July 30, 1960, leased certain property from appellants, Paul Ciaffoni and Peter Ciaffoni, who owned the property as tenants in common. Under a Rider Agreement which formed part of the lease and which was signed by both appellant landlords, the lease was assigned to McDonald Bowl, Inc. (McDonald), a corporation formed by Toder to start a bowling alley. The lease was for a term of ten years, for a total rent of $119,520, payable $11,520

at signing of the lease and $1,000 per month. It provided, in case of default, for confession of judgment, and in the event of default, bankruptcy, or insolvency, for the entire balance of the rent to become due and payable. Provision was made permitting the lessor to distrain for rent on all property found on the premises.

However, the rider provided that a landlord's waiver of the right to distrain in a form as was attached would be executed in order to permit the tenant to finance the purchase of bowling alleys and equipment. The attached form was an unexecuted general form of waiver covering Brunswick automatic pinsetters and naming as the protected seller Brunswick Automatic Pinsetter Corporation. The only wavier that was executed was to the benefit of Brunswick Corporation and was signed only by Paul Ciaffoni and his wife, and acknowledged on September 16, 1960.

McDonald proceeded to purchase under conditional sales contracts a great deal of bowling equipment from Brunswick Corporation and Brunswick Automatic Pinsetter Corporation. These corporations filed proper financing statements and became secured creditors. McDonald then defaulted in its obligations to both Brunswick Corporations and to the landlords.

On May 3, 1962, in the U.S. District Court for the Western District of Pennsylvania, McDonald was adjudicated a bankrupt. On July 5, 1962, the Referee in Bankruptcy entered an order that appellees were "entitled to take possession of the personal property" that is here in dispute. When appellees sought, on July 20, 1962, to remove the equipment, Paul Ciaffoni instructed employees of Brunswick to leave the premises and they departed voluntarily. Paul and Peter Ciaffoni then, on

July 23, 1962, distrained for rent on the equipment, taking possession of it.

On July 30, 1962, appellee filed this action in replevin with bond of $300,000. Appellants not having filed a counter bond, the appellees reposessed the property on September 15, 1962.

After a non-jury trial, the Honorable Barron P. McCune made an order awarding to Paul Ciaffoni his one-half share of the rents in default since Paul had not signed the waiver agreement. On appellees' exceptions the court *en banc* vacated the prior order and in an opinion by Judge McCune, ordered judgment for appellees, with costs on appellants.

The court *en banc* was of the view that appellees were creditor beneficiaries of the rider provision in which appellants agreed with Toder to sign a landlord's waiver in favor of appellees. Since equity regards that done which ought to be done, the court held that by virtue of the provision in the rider, Peter Ciaffoni, as well as Paul, had waived his right to distrain as a landlord.

We find it unnecessary to consider this third party creditor beneficiary theory by which the court *en banc* resolved the case. Nor need we consider whether appellees' recovery can be justified on a donee beneficiary theory[1], or a unilateral contract theory,[2] or a construc-

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1. Appellees urge that even if they are not creditor beneficiaries, they are donee beneficiaries whose rights have vested, because either; (a) no knowledge of the contract and assent to it are necessary for a donee beneficiary's rights to vest or (b) if they are necessary, they have impliedly been met.

2. Appellees claim that appellants, in the rider, promised a waiver to anyone actually providing McDonald with financing for its bowling supply purchases. Acceptance of the offer was to be unilateral, i.e., by the act of providing the financing.

tive trust theory.[3] We are of the opinion that the issue of the right to possession of the disputed bowling equipment has already been finally litigated in the bankruptcy action in the federal court and that we must abide by that decision.

Judge McCune originally found Paul Ciaffoni's distraint proper, holding that the property passed out of *custodia legis* at the time of the Referee's order and thus became a proper subject for distraint. The court *en banc* did not pass on the effect of the Referee's order.

We hold that the bankruptcy proceeding is determinative of the case. Judge McCune relied upon the case of National Cash Register Company v. Miller, 88 Pa. Superior Ct. 550, 553, ... A. ... (1926), where indeed it was held that: "... when the referee made the order directing the receivers to return the cash register to the plaintiff, it passed out of the custody of the law and immediately became subject to a distress by the defendant for rent in arrears so long as it remained on the demised premises."

We find that case unpersuasive and decline to follow it. Ordinary common sense requires that *custodia legis* continue until the order of the Referee could be effected. Otherwise the order of the Referee or bankruptcy court would be meaningless. The property would go to him who could get to it first after the order is made.

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3. Appellees urge that any award to Peter Ciaffoni would constitute unjust enrichment, since his claim is based solely on his own repudiation of a promise and his brother's illegal acts in preventing the removal of the equipment on July 20, 1962.

Moreover, even if the property had passed out of *custodia legis,* a distraint by appellants was no longer possible. The Referee in Bankruptcy had ordered that appellees were entitled to take possession of the disputed property. This was an adjudication *in rem* binding on all who might claim an interest in the property, including appellants. "Adjudications of the referee, if not reviewed within the time and in the manner prescribed, have the force and effect of judgments and orders of the District Court." In re Tinkoff, 85 F.2d 305, 307 (7th Cir. 1936), *cert. denied,* 299 U.S. 611. The manner prescribed is an appeal to the United States District Court. Appellants did not attack the Referee's adjudication in that way, and we will not permit a collateral attack here.

The order of the court below is affirmed.

Mr. Justice Eagen files a concurring opinion in which Mr. Justice Jones joins.

Mr. Justice Roberts files a dissenting opinion in which Mr. Justice Musmanno joins.

Concurring Opinion

Filed November 12, 1968

EAGEN, J.:

I agree with the result reached by Mr. Justice O'Brien but for a reason other than the one stated.

In my view, no incident of the bankruptcy proceeding defeated Peter Ciaffoni's distraint lien. However, both landlords lost their distraint rights by contractual waiver which Brunswick may properly enforce as a third party donee beneficiary. Hence, I concur in the result.

Mr. Justice Jones joins in this opinion.

Dissenting Opinion

Filed November 12, 1968

ROBERTS, J.

I dissent from the majority's unsupported action in overruling the only Pennsylvania appellate authority controlling this controversy. The majority dismisses the unanimous decision of the Superior Court in National Cash Register Company v. Miller, 88 Pa. Superior Ct. 550 (1926), with the simple assertion: "We find that case unpersuasive and decline to follow it. Ordinary common sense requires that *custodia legis* continues until the order of the Referee could be effected." The majority fails to indicate or even suggest just what its new concept of *continuation* of *custodia legis* entails; how long does the majority's extension theory continue after the referee's order terminating his custody of the property?

In National Cash Register, supra, at page 553, the Superior Court held that property ". . . will remain, by operation of law, in *custodia legis* until it is withdrawn from such custody by the order of a competent court: . . . But when the referee made the order directing the receivers to return the cash register to the plaintiff, it passed out of the custody of the law and immediately became subject to a distress of the defendant for rent in arrears *so long* as it remained on the demised premises." (Emphasis added.) Here the referee on July 5, 1962,[1] decided that the trustee had no interest in the

1. The record shows the reclamation petition was only served on the trustee and not on the Ciaffonis.

property and that Brunswick was entitled to possession. Brunswick then waited 15 days *after* that order before attempting to take possession of the property which continued to remain on the premises of the landlord. Surely, the referee's order withdrawing the property from the bankrupt estate did not immunize the property from the right of distraint of the landlord for as long as Brunswick chose to keep the property on the demised premises.

The facts before this Court are virtually the same as in National Cash Register. I must conclude that appellant landlord Peter Ciaffoni[2] had the right to distrain. I would remand the case for further proceedings on the merits to resolve the conflicting claims between the parties. See Act of May 7, 1929, P.L. 1589, §1, as amended, 68 P.S. §322. In Re Quaker City Uniform Co., 238 F.2d 155 (3d Cir. 1956); Reinhart v. Gerhardt, 152 Pa. Superior Ct. 229, 31 A.2d 737 (1943); Herman v. Osgood, 103 Pittsb. Leg. J. 231 (C.P. 1955).

Since under my view this record should return to the trial court, I would note that inherent in this case is a possible conflict between Articles 9-104(b) and 9-313(2) of the Uniform Commercial Code which may

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2. The right of distraint of Paul Ciaffoni, the other appellant, has been eliminated by waiver agreement excuted by him with the appellees. Peter and Paul Ciaffoni were tenants in common and, under our law, where property is owned jointly, each owner may waive his right to distrain as to so much of the rent as represents his portion of it. Unless expressly so authorized he could not execute a waiver in behalf of his joint owner. Peter gave no such authority in this case. Therefore, it must be concluded that Paul has waived his right of distraint, but that Peter has not. Bernstein v. Colletris, 99 Pa. Superior Ct. 484 (1930). See also Wally v. Jones, 275 Pa. 250, 119 Atl. 75 (1922); Penrose v. Penn Forest Coal Co. 289 Pa. 519, 137 Atl. 670 (1927).

affect the proper resolution of this case. Act of April 6, 1953, P.L. 3, §9, as amended, 12A P.S. §§9-104, 9-313.

Thus, I dissent.

MR. JUSTICE MUSMANNO joins.

UPREME COURT, U. S.

FILED

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968
NO. 1153

PAUL CIAFFONI, CONCETTA CIAFFONI and
PETER CIAFFONI, Petitioners
v.
BRUNSWICK CORPORATION and
BRUNSWICK AUTOMATIC PINSETTER
CORPORATION, Respondents

On Petition for Writ of Certiorari to the
Supreme Court of Pennsylvania (Western District)

BRIEF IN OPPOSITION

JOHN G. BUCHANAN, JR.
Counsel for Respondents
1800 Oliver Building
Pittsburgh, Pa. 15222

Of Counsel

WILLIAM R. NEWLIN
BUCHANAN, INGERSOLL, RODEWALD,
KYLE & BUERGER
1800 Oliver Building
Pittsburgh, Pa. 15222

SMITH BROS., LAW PRINTERS, 620 SECOND AVENUE, PITTSBURGH, PA. 15219

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OPINIONS BELOW

The Petition was in error in stating that the opinions of the Supreme Court of Pennsylvania were not yet officially or unofficially reported. Those opinions were published *sub nom.* Brunswick Corporation v. Ciaffoni at 432 Pa. 442 in the official Pennsylvania Advance Reports, Vol. 77, No. 3, dated January 17, 1969, and at 248 A.2d 39 in pamphlet dated January 4, 1969. Moreover, petitioners have incorrectly headed the opinion by Mr. Justice O'Brien in their Appendix (p. 18) as the "Opinion of the Court". The official Pennsylvania Advance Reports (p. 444) list the opinion as "Opinion By Mr. Justice O'Brien". Petitioners' Appendix also is inaccurate, and inconsistent with the official Reports, in

representing that Mr. Justice Musmanno (who died a month before the decisions were handed down) joined in the dissent. It further fails to reflect the official Reports' notation that neither Chief Justice Bell nor Mr. Justice Musmanno participated in the decision. The official Reports show the alignment of opinions and Justices as follows:

"Opinion By Mr. Justice O'Brien"—Justices O'Brien and Cohen;

"Concurring Opinion By Mr. Justice Eagen"—Justices Eagen and Jones;

"Dissenting Opinion By Mr. Justice Roberts"—Justice Roberts.

JURISDICTION

Respondents assert that this Court has no jurisdiction, within Article III, Section 2 of the Constitution of the United States, and under 28 U.S.C. §1257(3), to direct a writ of certiorari to the Supreme Court of Pennsylvania in this case.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Involved in the disposition of the Petition for Certiorari are:

(a) Article III, Section 2, clause 1 of the Constitution of the United States, which provides:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;-to all Cases affecting Ambassadors, other public Ministers and Consuls;-to all Cases of admiralty and maritime Jurisdiction;-to Controversies to which the United States shall be a Party;-to Controversies between two or more States;-between a State and Citizens of another State;-between Citizens of different States;-between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

(b) Section 1257(3) of the Judicial Code, Act of June 25, 1948, c. 646, 62 Stat. 869, as amended, 28 U.S.C. §1257(3), which provides:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> "(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being re-

pugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

QUESTION PRESENTED

Do Article III, Section 2 of the Constitution of the United States and 28 U.S.C. §1257(3) allow the Supreme Court to exercise jurisdiction on certiorari to a State court on the sole ground that two of the five participating members of the State court said that a final order in a federal bankruptcy proceeding was determinative of the case?

STATEMENT

The statement of the case in the Petition sets forth only some of the facts relevant to the federal issue presented by respondents in the courts below. It does not recite the facts relevant to the non-federal issues upon which the case was decided by all but two of the judges of the two courts below. Respondents do not believe it necessary to supply these omissions. All that is required for the present disposition is a correction of the statements in the last paragraph of page 4 of the Petition. The Supreme Court of Pennsylvania did not decide the case as there represented. The decision in respondents' favor was based on the opinion of two justices who addressed themselves to the federal issue and the opinion of two who rejected respondents' position on the federal issue but adopted one of respondents' purely State law grounds for decision. The fifth member of the Pennsylvania Supreme Court dissented on all grounds.

ARGUMENT

Two members of the Pennsylvania Supreme Court were of the opinion (Appendix to Petition, pp. 21-22) that the issue of the right of respondents to possession of the disputed bowling equipment had already been finally litigated in the bankruptcy action in the federal court. They found it unnecessary to consider respondents' various non-federal grounds. They did, however, say that property remains in *custodia legis* at least until an order of a referee in bankruptcy covering such property could be "effected" (*ibid.*, p. 21), thereby implying, as a matter of Pennsylvania law, that the *custodia legis* limitation on the right of distraint prevented petitioners from prevailing in any event.

The two other members of the Pennsylvania Supreme Court who found in respondents' favor (*ibid.*, p. 23) rejected all bankruptcy law arguments and said that respondents, as third-party donee beneficiaries under Pennsylvania law, were entitled to enforce petitioners' contractual waiver of their distraint rights. The sole dissenting member of the Pennsylvania Supreme Court (*ibid.*, p. 24) also rejected all arguments based on the federal bankruptcy laws and argued instead that the concept of *custodia legis* as it had existed under prior Pennsylvania state decisions should not be changed.

The Supreme Court of the United States has no jurisdiction under Article III, Section 2 of the Constitution to exercise jurisdiction in this case. The case is not one arising under the Constitution or laws of the United States. The Petition merely attacks the opinion of two (out of five) members of a State court who would limit

rights under the State's distraint laws against property awarded by a federal bankruptcy reclamation order.

This Court has no jurisdiction under 28 U.S.C. §1257(3) to direct a writ of certiorari to the Supreme Court of Pennsylvania. The validity of no treaty or statute of the United States, nor of any State statute, was drawn in question in the courts below. Respondents' only claim of title, right, privilege or immunity under the Constitution and laws of the United States was expressly rejected by all but two out of the five participating members of the Pennsylvania Supreme Court.

The Petition does not assert the existence of any conflict of decisions. It attempts to ignore the fact that whatever federal question there was in the case disappeared when only two Pennsylvania justices agreed with respondents' bankruptcy law contentions and three expressly rejected them. The Pennsylvania Supreme Court has not "decided" any "federal question of substance": *cf.* Revised Rule 19.1(a).

Though we submit that Mr. Justice O'Brien and Mr. Justice Cohen were correct in their views, there is in any event no occasion for this Court to review their minority position on a question which is not substantial. Neither do the Constitution and laws of the United States permit this Court to exercise jurisdiction in this case.

CONCLUSION

The Petition should be dismissed.

Respectfully submitted,
JOHN G. BUCHANAN, JR.
Counsel for Respondents
1800 Oliver Building
Pittsburgh, Pa. 15222

Of Counsel

WILLIAM R. NEWLIN
BUCHANAN, INGERSOLL, RODEWALD,
KYLE & BUERGER
1800 Oliver Building
Pittsburgh, Pa. 15222